LE COPY

OCT 13

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-293

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner,

v.

MARVIN W. BROWN,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
WILLIAM L. ROBINSON
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019

J. LeVONNE CHAMBERS
ROBERT BELTON
CHAMBERS, STEIN, FERGUSON & LANNING
237 West Trade Street
Charlotte, North Carolina

CONRAD O. PEARSON
203½ E. Chapel Hill Street
P. O. Box 1428
Durham, North Carolina

Attorneys for Respondent.

Of Counsel

ALBERT J. ROSENTHAL
435 West 116 Street
New York, New York 10027

INDEX

PAGE

Questions Presented for Review 1

Statement of the Case 2

ARGUMENT 6

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), *affirmed*, 371 U.S. 37 (1962) 20

Boudreaux v. Baton Rouge Marine, 437 F.2d 1011 (5th Cir. 1971) 14

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 8

Brady v. Bristol Myers, 459 F.2d 621 (8th Cir. 1972) 14

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 404 U.S. 998 (1971) 13-14

Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970), *cert. denied*, 400 U.S. 951 (1970) 8

Clark v. American Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969) 21

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2nd Cir. 1968) 10

Hackett v. McGuire Brothers, Inc., 445 F.2d 442 (3rd Cir. 1971) 9, 11, 12, 13

Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966) 7-8

PAGE

Heard v. Mueller Co., —— F.2d ——, 4 EPD ¶7904 (1972) 12, 13
Hodges v. United States, 203 U.S. 1 (1906) 14
Huff v. N. D. Cass Co., —— F.2d ——, 4 EPD ¶7775 (1972), *reh'g granted* (CA 5 1972), 4 EPD ¶7775 12

Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) 9, 18
Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 8, 11, 12
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 13, 14, 16, 17
Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir., 1970) 20

Kahan v. Rosenstiel, 424 F.2d 161 (3rd Cir. 1970) 11

Lea v. Cone Mills Corp., 301 F. Supp. 97 (D.C. N.C. 1969), aff'd in part and vacated in part *per curiam*, 438 F.2d 86 (4th Cir. 1971) 21, 24
Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 18

Mack v. General Electric Co., 329 F. Supp. 72 (E.D. Pa. 1971) 9-10
Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157 (8th Cir. 1971) 20
Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971) 11
Mills v. Electric Auto Lite Co., 396 U.S. 375 (1969) 25

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 25

PAGE

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) 11-12, 18, 19, 20, 21, 23
Potts v. Flax, 313 F.2d 284 (5th Cir. 1963) 9

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972) 24
Rowe v. General Motors Corp., —— F.2d ——, 4 EPD ¶7689 (5th Cir. 1972) 20

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) 14
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.ed. 2d 386 (1969) 17

Tipler v. E. I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971) 11, 13

United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971) 20
United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969) 20
United States v. IBEW, Local 18, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970) 20
United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, —— U.S. —— (1972) 18, 20, 21
United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969) 21
United States v. W. T. Grant Co., 345 U.S. 629 (1953) 23

Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) 14, 16, 17

PAGE

Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) 11
Young v. International Tel. & Tel. Co., 348 F.2d 757 (3rd Cir. 1971) 13

Statutes and Other Authorities:

42 U.S.C. § 1982 14

42 U.S.C. § 1981 ..... 1, 2, 13, 14, 15-16, 17, 23

Equal Employment Opportunity Act of 1972, P.L. 92-261 ..... 10, 15

Federal Rules of Civil Procedure, Rule 12 (h) (2) 16

Federal Rules of Civil Procedure, Rule 23 ..... 3, 7, 9, 10, 11, 12

H.R. Rep. 92-238 (1971) 15

Title VII of the Civil Rights Act of 1964— 42 U.S.C. § 2000e et seq. ..... *passim*

118 Cong. Rec. S. 2300 (daily ed. Feb. 22, 1972) 10

118 Cong. Rec. H. 1863 (daily ed. March 8, 1972) 10

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-293

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner,

v.

MARVIN W. BROWN,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

Questions Presented for Review

1. If a plaintiff sues his former employer under Title VII of the Civil Rights Act of 1964, on his own behalf and on behalf of a class of other, present and future employees of the defendant, alleging racial discrimination against blacks in pay, terms, conditions and privileges of employment, and if the district court orders the case tried as a class action and the case is so tried, and the district court renders a decision on the merits as to both the individual and class claims asserted, did either the fact that the individual plaintiff was a former employee not seeking reinstatement or the fact that his individual claim was dismissed deprive the court of appeals of discretion to order class relief for the protection of present and future employees of the defendant?

2. Is racial discrimination against blacks on the part of private employers actionable under 42 U.S.C. § 1981?

3. On the facts of this case, was it error for the court of appeals to hold that statistics, showing that almost all of the better paying jobs in petitioner's plant were held by whites and that almost all blacks were kept in menial low-paying jobs, gave rise to a prima facie showing of racial discrimination, that the evidence presented by petitioner had not rebutted this presumption, while other evidence had corroborated it, and that the case should therefore be remanded to the district court for retention on its docket for a reasonable time, at the end of which the district court may dismiss the action if it finds that unlawful employment practices have been eliminated but must issue appropriate injunctive relief if it finds that such practices remain?

4. On the facts of this case, was it error for the court of appeals to direct that plaintiff be awarded his costs and reasonable counsel fees?

Statement of the Case

This action was filed in the United States District Court for the Western District of North Carolina on May 31, 1966. Respondent Marvin W. Brown (hereinafter "plaintiff") sued "to secure protection of and redress deprivation of rights secured by (a) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e . . . and (b) 42 U.S.C. § 1981 . . . ." (Complaint ¶1, A3).* The complaint specifically designated the action as a class action under Rule 23 of the Federal Rules of Civil Procedure. Injunctive relief against racial discrimination and against denials of

* Page references herein prefaced by "A" relate to pages in the record on appeal to the court of appeals. Page references to the appendix to the Petition for Certiorari are designated "——a").

equal employment opportunity rights granted by both of the aforementioned statutes was requested on behalf of both the plaintiff individually and the class, as well as back pay for the plaintiff individually. (A3-7).

The answer denied plaintiff's allegations of discrimination. (A6-8). Petitioner moved to dismiss the complaint on the ground that the Equal Employment Opportunity Commission had not undertaken conciliation efforts. A district court order of dismissal was reversed by the court of appeals, 405 F. 2d 887 (4th Cir. 1968), and certiorari was denied, 394 U.S. 918 (1969).

The defendant then challenged the standing of plaintiff to pursue this claim as a class action. On August 26, 1969 the district court entered an order determining that this action was a proper class action under Rule 23(a), (b)(2), of the Federal Rules of Civil Procedure. (A14). Petitioner did not thereafter move to amend this order, and the case was tried on the merits, as a class action, on September 29 and 30 and October 1, 1970.

The district court in an Opinion and Order filed December 31, 1970, denied both the individual and class claims for relief and dismissed the action. (24a). The court found that although plaintiff had completed a two-year college course in welding and related skills, he was employed by petitioner in 1960 to do "picking and grinding" (28a), a low-skill, low-pay job (A15-17, 8a).* The district court

---

* While the complaint had stated "The plaintiff was employed by the defendant in November, 1961 as a welder and worked as such through January 31, 1966 (¶VII, A4), the answer responded that plaintiff had commenced employment with defendant "on June 29, 1960, and having been transferred during such period of employment to the job of welder-fabricator trainee in November of 1961 (¶VII, A7). The chronology set forth in the answer was correct, and the case was tried on that basis, with considerable

found: "Brown asked for employment as welder and was given to understand by supervisory people that it was premature to try to place a Negro in a job as welder with the defendant." (28a). Only when the president of the company personally intervened over a year later was plaintiff given a welding job. (*Id.*).

The district court found that once plaintiff was assigned to welding, he was subject to no further discrimination, and denied him any individual relief. (29a-30a). It gave no explanation for its failure to accord relief for the period from June 1960 to November 1961 during which petitioner was barring all blacks from welding jobs.

Class relief was also refused, despite the district court's findings that "at least in prior years, welding and high pay in the defendant's shop were not for black men" (30a), and "No black employees participated in the welder training program until about 1968." (27a). The reasons assigned by the court in denying relief to the class were the long-standing desegregation of company functions, announcement by the petitioner in 1965 when Title VII became effective that it would be observed, a finding that "advertisements for welders for at least two years [!] have been without regard to race," the "genuine" and often successful efforts of petitioner to recruit black workers for the higher paying welding jobs, and that blacks sometimes dropped out of welding work. (30a-31a).

---

testimony addressed to the circumstances of plaintiff's hiring and initial assignment as a pickler and grinder in 1960. (E.g., A89-93, A186-191, A322). Issues concerning this period were properly before the court, since ¶VII of the complaint alleged, inter alia, "Throughout plaintiff's employment with the defendant, the defendant has limited and classified plaintiff . . . solely because of the plaintiff's race and color." (A4).

On appeal, the court of appeals held:

1. The district court's findings established that the petitioner had violated 42 U.S.C. § 1981, by denying plaintiff a welding job because of his race between the time he applied in 1960 and the time he was assigned to welding in 1961, and that he was therefore entitled to back pay in the amount of the difference between what he had earned and what he would have earned as a welder. (4a).

2. The district court's finding that plaintiff had not been the victim of racial discrimination after he had become a welder was supported by the record and was binding on appeal. Thus, plaintiff's claim for individual relief under Title VII for this period was denied. (4a-5a).

3. The failure of the plaintiff to prove his individual Title VII claim did not deprive the class he represented of a remedy. (5a). At least a prima facie case of racial discrimination against the class of black employees was shown by the striking concentration of whites in the higher paying positions and blacks in the lowest (7a-9a), which was not rebutted by such efforts as the petitioner made since 1965 to hire and promote black employees. (10a). The court also noted the long delay on the part of petitioner in admitting blacks to its after-hours training program in welding (5a-6a), and it found that the petitioner's lack of objective, formal guidelines for hiring, promotion and transfer, and its failure to give notice of vacancies within the plant except by word of mouth (6a, 10a-12a) served "to corroborate, not to rebut, the racial bias pictured by the statistical patterns of the company's work force." (12a).

4. Despite improvement in many of the petitioner's practices, most of which had occurred since institution of

this suit, the transition to a shop free from discrimination was still incomplete. (12a-13a). If the litigation were prematurely terminated, members of the class might run the risk that this progress would abruptly end. The case was therefore remanded to the district court "for retention on its docket for a reasonable time. If, at the end of this period, the court finds that the company's employment policies have completely eliminated the unlawful practices prohibited by § 703(a) [of the Civil Rights Act of 1964], it may dismiss this action. However, if any unlawful employment practices remain, the court must order appropriate injunctive relief. In either event, the plaintiff is entitled to recover his costs and reasonable counsel fees." (13a).

Rehearing en banc was denied on May 22, 1972. (23a).

ARGUMENT

1. *Class Relief:* Petitioner contends that the class relief awarded by the court of appeals was improper, on the ground that the named plaintiff had not proved his individual claim under Title VII of the Civil Rights Act of 1964 and that he had resigned from employment with the petitioner before instituting this action.

Over a year before the trial the district court had ordered that the action be maintained as a class action "insofar as it seeks injunctive relief from the alleged racially discriminatory employment practices existing at any time since the effective date of Title VII . . . . The class which the plaintiff represents includes those Negroes presently employed as well as those who may subsequently be employed by the defendant . . . ." (A14). The Title VII aspect of the case was tried as a class action, and the

district court's decision dealt (albeit adversely) not only with the plaintiff's individual claim but also specifically with the claim for class relief. (30a-31a). When the plaintiff appealed to the Court of Appeals from the district court's denial of both individual and class relief, the defendant's brief argued only the correctness of the district court's decision on the merits, but did not cross-appeal from the order that the case be maintained as a class action. Only now, in its petition for certiorari, does the petitioner raise this question.

But even if this issue could properly be raised before this Court at this late date, petitioner's position has no merit. The test, under Rule 23 of the Federal Rules of Civil Procedure, is not whether the claims of the class representative are identical with those of the class—only whether they are "typical" of them. When an employer practices discrimination against blacks, it characteristically creeps into almost every aspect of his employee relations—hiring, job assignments, promotions, transfers, discharge. We have found no case in which a court has held that the victims of each of these manifestations of an over-all discriminatory policy must be placed in a separate class and that one who has suffered from one of these forms of discrimination is barred from representing a class including victims of other forms. The courts have consistently recognized that the claims of one who has suffered from racial discrimination in one of these respects are typical of those who have suffered from racial discrimination in any of them. It is the discrimination that is the common denominator.

> "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects

> of the discrimination will always be felt equally by all the members of the racial class .... But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class." *Hall* v. *Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966)*

Thus, the courts have consistently held that named plaintiffs in Title VII actions may represent not only those who suffered racial discrimination in identical form, but all victims of the racially discriminatory practices of the same employer.

For example, individual plaintiffs claiming that they were denied employment because of their race may represent a class that also includes incumbent employees, and secure injunctive relief against racial discrimination in the conditions of their employment. *Carr* v. *Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970), cert. denied, 400 U.S. 951 (1970). An individual plaintiff claiming to have been discharged for racial reasons may represent a class of all past, present and future black employees and seek plant-wide relief against racial discrimination not only in firing of employees but also in hiring, promotion and maintenance of facilities. *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). A

* "The very nature of a Title VII violation rests upon discrimination against a class characteristic, i.e., race, religion, sex or national origin." *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 428 (8th Cir. 1970). See also *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 311 (5th Cir. 1970).

pensioner claiming that he had previously been a victim of discriminatory discharge may pursue a class action complaining of discrimination in hiring, promotion and seniority, as well as his individual claims. *Hackett* v. *McGuire Brothers, Inc.*, 455 F.2d 442 (3rd Cir. 1971). An employee, whose individual claim was one of racial discrimination in refusing to give him a promotion, was permited to pursue a class action attacking every aspect of racial discrimination in employment by the defendant and the granting to him of the job he sought shortly after the suit was brought was held not to moot either his individual claim or his class action for injunctive relief on behalf of all black employees. The court specifically rejected the contention that there was no class represented by the plaintiff since the only other Negro denied the same promotion had also since been granted it, by asserting "this ignores element (2) of the claim—plant-wide system-wide racially discriminatory employment practices." *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 34 (5th Cir. 1968). Compare also *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963).

> "Congress has taken giant strides to legislate bias out of our economy. Given the tools that Congress has now provided, courts would be remiss if they were not used to the fullest extent. The broad Congressional purpose, expressed in the civil rights acts, of eliminating job bias can well be effectuated by allowing any Negro claiming that an employer has discriminated against him on racial grounds to sue to end all that employer's racial discrimination." *Mack* v. *General Electric Co.*, 329 F. Supp. 72, 75-76 (E.D. Pa. 1971).

And, as pointed out in *Mack*, "the across-the-board approach allows those who need not fear adverse job consequences to sue to end discrimination against those who

might fear to bring such suits, such as present employees concerned about job security." *Id.*

Thus, the only pertinent question in a case such as this is whether there has been compliance with the test set forth in Rule 23 (a)(4), F.R.C.P., that "the representative parties will fairly and adequately protect the interests of the class." As stated by Judge Medina in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968),

> "an essential concomitant of adequate representation is that the party's attorney be qualified, experienced, and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class." *

---

* Nor does anything in the legislative history of the Equal Employment Opportunity Act of 1972, P.L. 92-261, amending Title VII, suggest an intention to narrow the Title VII class action law developed prior to the amendment's enactment; indeed, there is clear indication of Congressional recognition and approval of the line of cases allowing class actions broadly, and in particular permitting class representatives to assert claims on behalf of the class that differ from their individual grievances. This is reflected in the section-by-section analysis of the bill as it emerged from the Conference Committee, submitted by Senator Williams before adoption of the conference bill:

> "In establishing the enforcement provisions under this subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits in Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves consideration beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints." 118 Cong. Rec. S.3462 (daily ed. March 6, 1972); 118 Cong. Rec. H.1863 (daily ed. March 8, 1972); see also 118 Cong. Rec. S.2300 (daily ed. Feb. 22, 1972).

Neither court below has indicated any doubt that this test has been met; indeed, the vigor with which this case has been pursued, on behalf of the class as well as of the named plaintiff, and the successful result accomplished on behalf of the class in the court below, themselves demonstrate how fairly and adequately the interests of the class have been protected. Certainly, what amounts to a determination by both courts below that the tests of Rule 23 have been met is scarcely appropriate for reconsideration, by this Court, and at this stage in the proceedings.

Neither can it be maintained that the loss by the plaintiff on the issue of his individual Title VII claim deprived him of standing to represent the class and required dismissal of the class aspects of the case after they had been fully tried. If this were so, class actions would have to be terminated whenever the individual plaintiff for one reason or another (e.g., promotion, settlement, disability, or discharge) lost his right to individual relief. *But cf. Jenkins* v. *United Gas Corp., supra.* And such a rule would offer an incentive to employers to find "valid" reasons to discharge plaintiffs who bring class actions under Title VII.

Thus, it is scarcely surprising that every court of appeals that has considered this question has ruled that the validity of a class action does not depend on the success or failure of the individual claims of the class representatives. *Yaffe* v. *Powers,* 454 F.2d 1362 (1st Cir. 1972); *Hackett* v. *McGuire Brothers, Inc.,* 445 F.2d 442 (3rd Cir. 1971); *Kahan* v. *Rosenstiel,* 424 F.2d 161 (3rd Cir. 1970); *Miller* v. *Mackey International, Inc.,* 452 F.2d 424 (5th Cir. 1971); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969); *Tipler* v. *E.I. duPont de Nemours & Co.,* 443 F.2d 125 (6th Cir. 1971); *Parham* v.

Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).*

Neither do the cases relied on by petitioner show a conflict in the circuits. In *Huff* v. *N.D. Cass Co.*, —— F.2d ——, 4 EPD ¶7775 (1972), a panel of the Court of Appeals for the Fifth Circuit affirmed findings of fact by the district court that two of the prerequisites of a class action set forth in Rule 23 were lacking—that the class was not so numerous that joinder of all members was impracticable, and that the plaintiff could not and would not fairly and adequately protect the interests of the class. Neither factor is present in the instant case; the order of the district court can only be regarded as finding precisely the opposite, and it was not thereafter modified or even challenged.

Moreover, even if the *Huff* case were in point, it appears to run counter to a long line of Fifth Circuit decisions, some of which are cited above; the Fifth Circuit has ordered a rehearing en banc, and has the case under advisement. At the most, what we have is not a conflict between circuits but rather a conflict between panels of the same circuit, which it is itself seeking to resolve. The issue is neither ripe nor appropriate for intervention by the Supreme Court.

Similarly, the Sixth Circuit case of *Heard* v. *Mueller Co.*, —— F.2d ——, 4 EPD ¶7904 (1972), is not in point.

---

* Couching the issue in terms of plaintiff's "standing" adds nothing to an analysis of the problem. As pointed out by the Court of Appeals for the Third Circuit in *Hackett* v. *McGuire Brothers, Inc.*, *supra*, at 446, the statutory description, in Title VII, of a qualified complainant, "a person claiming to be aggrieved" "shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." The issue thus necessarily remains solely whether the requirements of Rule 23 of the Federal Rules of Civil Procedure have been met. See *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 1124-25.

There the individual plaintiff did not originally bring his case as a class action; eleven months later and after having voluntarily left the company, he moved to change the nature of his action to a class action, the district court held the motion moot, and the court of appeals affirmed. There was obviously lacking the vigorous effort to protect the entire class from the inception of the action, that characterized the instant case, and to the extent that the district court might be deemed to have made a finding it was that the individual plaintiff would not properly represent the class; precisely the contrary elements were present in the instant case.

Moreover, here again, even if the *Heard* case were in point, it would reflect a conflict within the Sixth Circuit, since in *Tipler* v. *E.I. duPont deNemours & Co., supra,* another panel of the same circuit had specifically held that the discharge of the named plaintiff did not prevent the action from going forward, on behalf of those continuing in employment, against discrimination in promotions and other incidents of employment. Here too, if indeed there is conflict at all, it is an intra-circuit rather than an inter-circuit conflict which is asserted.

2. *42 U.S.C. § 1981:* Petitioner's criticism of the holding of the court of appeals in favor of the individual plaintiff pursuant to 42 U.S.C. § 1981 is equally untenable. Every court of appeals that has passed upon the question since the decision of this Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968), has held § 1981 applicable to racial discrimination, by private employers, against blacks. *Hackett* v. *McGuire Brothers, Inc.,* 445 F.2d 442 (3rd Cir. 1971); *Young* v. *International Tel. & Tel. Co.,* 438 F.2d 757 (3rd Cir. 1971); *Caldwell* v. *National Brewing Co.,* 443 F.2d 1044 (5th Cir. 1971), *cert. denied,* 404 U.S.

998 (1971); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Brady* v. *Bristol Myers*, 459 F.2d 621 (8th Cir. 1972).

"[T]he same right . . . to make and enforce contracts," in § 1981, and "the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," in § 1982, were both derived from the same sentence of the same section (1) of the Civil Rights Act of 1866. This Court, in *Jones*, construed § 1982 to apply to private discrimination, with no requirement that state action be shown, and upheld the statute so construed as a valid exercise of the power of Congress to implement the abolition of slavery. There is no conceivable basis, in history or logic, whereby these provisions can be fragmented so that state action can be required for one to be invoked but not the other. Each of the courts of appeals cited above, now joined by that for the Fourth Circuit, has so held.

Moreover, this Court, in *Jones, supra*, at 442-43, n. 78, expressly overruled *Hodges* v. *United States*, 203 U.S. 1 (1906), an earlier case suggesting that § 1981 was inapplicable to employment discrimination in the absence of state action. See *Waters* v. *Wisconsin Steel Works, supra*, at 482. And, as a matter of principle, this rule in employment discrimination cases is an *a fortiori* application of the principle of *Jones*. Restrictions on the right to dispose of one's labor without discrimination are even more inherently badges of slavery than restrictions on the right to own property; there have been societies, such as ancient Greece and Rome, in which slaves were allowed to own property, but restraints on freedom to use one's labor as

one wishes is inherent in slavery, indeed virtually the definition of slavery.

It should also be noted that in its consideration of what was to become the Equal Employment Opportunity Act of 1972, P.L. 92-261, the House Committee on Education and Labor re-affirmed the intention of Congress in enacting Title VII that remedies for employment discrimination under other federal legislation would not be preempted, and specifically cited with approval the decisions in *Young* v. *International Tel. & Tel. Co.*, and *Sanders* v. *Dobbs Houses, Inc., supra.*, stating that they "have affirmed this Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rep. 92-238, pp. 18-19 (1971). See also the recognition that "charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as . . . the Civil Rights Act of 1866", in the expression of views of a minority of the Committee which had unsuccessfully sought to make Title VII the exclusive federal remedy for employment discrimination. *Id.*, at 66.

Hence the decision of the court below on this issue is in accordance with the intention of Congress and with the decision of the courts of appeals of every other circuit that has considered it; it is completely consistent with the decisions of this Court; and it is correct as a matter of principle. Every factor leads to the same conclusion; there are no uncertainties, and no conflicts, for this Court to resolve.

Petitioner professes surprise, however, at the granting of backpay to the individual plaintiff pursuant to 42 U.S.C.

§ 1981, suggesting that it had no way of anticipating or meeting this issue in view of its understanding, at least prior to *Jones*, that § 1981 applied only to state action. This suggestion appears to be disingenuous. Petitioner or its lawyers may have misunderstood § 1981, but such misunderstanding was by no means universal. Plaintiff's complaint, filed in 1966 (two years before *Jones*) alleged violations of § 1981 as well as of Title VII of the Civil Rights Act of 1964. Moreover the case was not tried until September 1970,* over two years after *Jones* and over five months after *Waters* v. *Wisconsin Steel Works*, *supra*. Plaintiff's attorneys made quite clear at the trial that they were proceeding under both statutes. See, *e.g.*, A82, A235. And an entire section (point V) of their brief in the Court of Appeals was devoted to the question of the applicability of § 1981, and eight decisions of circuit and district courts in point were cited. Petitioner's attorneys never responded to this issue, but they can scarcely claim surprise at this late date.

The same considerations apply to their assertion that they were denied the opportunity to plead the statute of limitations to the claim under § 1981. It is far from clear that the applicable statute would have barred plaintiff's claim; but even if it were, there must eventually come a time when defenses not asserted must be regarded as waived. Cf. Rule 12 (h) (2), F.R.C.P. Even if petitioner would have had some basis before or at the start of the trial for asking permission to amend its answers in order to plead the statute of limitations, the time for such

---

* The principal reason for the lapse of time was the attempt of the petitioner to challenge on grounds of exhaustion of remedies, the right of the plaintiff to proceed under Title VII. See p. 3, *supra*. This unsuccessful effort, which culminated in denial of certiorari by this Court, stalled the case for a period of almost three years.

amendment is long since past. The policy against assertion of state claims must have a counterpart in a policy against assertion of stale defenses.

Petitioner is also mistaken when it asserts that the only finding of the district court upon which the Court of Appeals based its holding that § 1981 was applicable to petitioner's refusal to employ the plaintiff as a welder was its statement, "Although Brown may have been originally denied a welding job because of race. . . ." (29). Petitioner overlooks the finding of the district court "Brown asked for employment as a welder and was given to understand by supervisory people that it was premature to try to place a Negro in a job as a welder with the defendant." (28a).

Neither is there merit in petitioner's objection to what it regards as a "retroactive" application of the *Jones* doctrine. As stated by the Court of Appeals for the Seventh Circuit in *Waters, supra*, at 484: "This argument is sufficiently answered by the fact that the Supreme Court has already applied the *Jones* case retroactively in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969)."

3. *Proof of Discrimination:* Petitioner's challenge to the decision of the court of appeals as to class discrimination is based upon misreading of the findings of the district court, of the decision of the circuit court of appeals, and of the applicable law.

The repeated references in the Petition for Certiorari (pp. 3, 13, 21 *et seq.*), to "findings" of the district court that petitioner had not engaged in racial discrimination in violation of Title VII, have no basis whatever. There were no such findings. If anything, a fair inference from the court's opinion would be that it did find such discrimina-

tion: ["T]here are some statistics and some testimony which show that, at least in prior years, welding and high pay in the defendant's shop were not for black men." (30a). "Advertisements for welders *for at least two years* have been without regard to race." (*Id.*). (emphasis supplied). "No black employees participated in the welder training program until about 1968." (27a). What the district court did was to reach a conclusion of law, that the steps petitioner had taken to treat blacks more fairly, most of them recent and since institution of this lawsuit, justified refusal of relief. (30a-31a).

Even if there had been a finding that petitioner had not engaged in discrimination in violation of Title VII, it would have been a finding of "ultimate fact" of which review on appeal is not hampered by the "clearly erroneous" rule. *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 423-24 (5th Cir. 1971) *Cert. denied*, —— U.S. —— (1972), and cases there cited. Moreover, even if the court had found that violations had ceased at the time of decision, this would not necessarily have precluded relief where there was a showing that the petitioner had been violating the Act in the past. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426, 429 (8th Cir. 1970); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968); *Local 53 of Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969). But the court actually made no findings whatever that can properly be read as absolving petitioner from having violated Title VII, either in the past or in the present.

The decision of the court of appeals is similarly misconstrued by petitioner. It did *not* base its conclusion solely on a single day's statistical tabulation (Petition, pp. 3, 13, 21, 22), or on a comparison between those figures

and the population statistics of the area. (Id. p. 3). It did *not* impose racial quotas or require that "the racial make-up of its various job categories shall become altered so as to correspond to that of the surrounding community" (Petition, p. 3, see also *id.*, pp. 21, 27), or that preferences be granted to minority employees (Id. pp. 27-30). And it did *not* bolster its conclusion by referring to a lack of "*written* objective criteria for promotion" (Petition, p. 31; italics in petition). We return, then, from the imaginary decision postulated by petitioner to the actual holding of the case.

What the court of appeals did hold was that the overwhelming statistical evidence of relegation of blacks with almost no exceptions to the least skilled and poorest paying jobs (7a-9a) was at least presumptive evidence of racial discrimination; that it had not been rebutted by the petitioner's efforts since 1965 to hire and promote black employees (10a); and that the lack of objective standards for hiring, pay increases and promotions (10a-12a), as well as the passing on of news of vacancies by word of mouth in a plant where job classifications were segregated, instead of the posting of notices (12a), "serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's work force." (12a). It also pointed out that from 1958 to 1968, only one black employee was admitted to its after-hour training program (6a).

It is a truism that Title VII forbids concealed, as well as overt, racial discrimination. Such discrimination often can be most effectively proved through statistical evidence. Indeed, at least one court of appeals has held statistical evidence to have itself established a violation of Title VII as a matter of law. *Parham* v. *Southwestern Bell Telephone Co.*, *supra*, at 426. The court of appeals in the instant case did not go that far, basing its decision on the

failure of petitioner to rebut the inference to be drawn from the statistics, together with the corroborating factors set forth above (10a). But the courts of appeals have repeatedly held, without exception, that such statistical evidence is at least presumptive proof of discrimination. *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, — v.s. — (1972). *United States* v. *Hayes International Corp.*, 415 F.2d 1038, 1041, 1043-44 (5th Cir. 1969); *United States* v. *IBEW, Local 18*, 428 F. d 144, 151 (6th Cir. 1970); *Cert. denied* 400 U.S. 943 (1970). *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F.2d 1157, 1160-61 (8th Cir. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir., 1970), *cert. denied*, 401 U.S. 954 (1971).*

The reliance by the court of appeals upon the other corroborative evidence of discriminatory practices by defendant was also in accord with precedent. The lack of objective standards in hiring, classification and promotion was held discriminatory in *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971); *Rowe* v. *General Motors Corp.*, 357 F.2d 348 (5th Cir. 1972); see also *United States* v. *Jacksonville Terminal Co., supra*, at 499. And the failure to post notices of openings for better jobs with dependence upon word of mouth communication by white employees and the resulting unlikelihood of blacks learning of the opportunities in time, has

---

* As stated in *Jones* v. *Lee Way Motor Freight, Inc., supra*, at 247, "[i]n racial discrimination cases, statistics often demonstrate more that the testimony of many witnesses, and they should be given proper effect by the courts." See also *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir. 1962), *affirmed*, 371 U.S. 37 (1962): "In the problem of racial discrimination, statistics often tell much, and courts listen"

similarly been held discriminatory in *Parham* v. *Southwestern Bell Telephone Co., supra,* at 427, and *United States* v. *Sheet Metal Workers, Local 36,* 416 F.2d 123, 137 (8th Cir. 1969); *Lea* v. *Cone Mills Corp.,* 301 F. Supp. 97 (DC NC 1969) aff'd in part and vacated in part *per curiam,* 438 F.2d 86 (4th Cir. 1971); *Clark* v. *American Marine Corp.,* 297 F. Supp. 1305 (E.D.La. 1969).

Petitioners assert, however, that the decision below conflicts with that of the Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Co., supra,* at 446-48. But the court in that case clearly followed the mainstream of decisions holding that statistical evidence afforded prima facie proof of racial discrimination without any necessity of a showing of individual discriminatory acts. *Id.,* at 422, 448-49. It did hold, but as to one issue only (new hires), that the employer had met the burden of rebutting the statistical evidence by showing that, because of the unique facts of sharply declining employment in the railroad industry, coupled with a pre-Act history of restriction of certain positions to whites, the most experienced applicants for vacancies really were all white. *Id.* at 445. But it declined to find any such rebuttal as to promotions and transfers (*id.* at 448 *et seq.*), and even as to the new hires the court stated expressly:

> "All of the persons so hired were white. In a stable or expanding industry, this fact would be damning, especially in regard to unskilled or semi-skilled positions . . . ." (*Id.* at 445).

There is no comparable explanation for the statistics adduced in the instant case. Petitioner is engaged in a stable or expanding industry.* The facts, with respect

* The total number of hourly employees *rose,* from 216 in September, 1969 (8a) to 230 in September, 1970 at the time of trial (A384).

both to initial assignments and to transfers and promotions, are indeed "damning."

Petitioner's stress upon the fact that the employment statistics reflected the work force on a single day (Sept. 3, 1969), is scarcely well taken. The information was derived from petitioner's answer to plaintiff's interrogatories. The interrogatories were filed on June 30, 1966 (A9), and not answered by petitioner until September 18, 1969 (A15). Petitioner itself selected the date as of which the data was compiled. Nevertheless, if the figures at the time of trial, over a year later, had shown less of a segregated pattern, petitioner could have introduced such evidence, by way of explanation or rebuttal, at trial. It did not.*

Such belated efforts at compliance with Title VII as were undertaken by petitioner do not justify dismissal of the action. The pattern of almost total segregation of employees in low-paying jobs still persisted in September, 1969, over three years after the complaint had been filed in the instant case and over four years after the effective date of Title VII. The district court found "No black employees participated in the welder training program until about 1968." (27a). Such progress as has been made has occurred largely since the inception of this action (13a; see also 31a), but the Court of Appeals noted that if the action were prematurely dismissed members of the class would run the risk that progress would abruptly end. (13a). Accordingly, while it gave recognition to the efforts of petitioner by not ordering injunctive relief, it directed that the case be remanded to the district court

---

* The Personnel Director of petitioner testified as to the work force as of the time of trial. The total number of black hourly employees had *dropped* from 29 out of 216 in September, 1969 to 24 or 25 out of 230 in September, 1970. No breakdown by job categories or pay scales was offered. (A384).

for retention on its docket for a reasonable time, directing that if at the end of that time the court found that illegal discrimination had been eliminated it might dismiss the action but that if it found that the unlawful practices were continuing it must order injunctive relief. (13a).*

This procedure was in conformity with that ordered by the Eighth Circuit in *Parham* v. *Southwestern Bell Telephone Co., supra.* Moreover, later repentance does not necessarily render even injunctive relief inappropriate, much less the less stringent form of relief ordered by the Court of Appeals. *Parham, supra; Jones* v. *Lee Way Motor Freight, Inc., supra,* at 248; *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632-33 (1953); *Rowe* v. *General Motors Corp., supra.*

4. *Counsel Fees:* petitioner also challenges the direction of the Court of Appeals, in remanding the case to the district court, to award the plaintiff costs and counsel fees. The award of counsel fees in Title VII cases, and presumably also in 42 U.S.C. § 1981 cases, is discretionary; nevertheless, where a refusal by a district court to award counsel fees would be an abuse of discretion it is entirely fitting that the Court of Appeals in remanding the case direct that such an award be made. Economy of judicial effort is served thereby.

The propriety of counsel fees in the circumstances of this case is clear. The decision below is in accord with precedent. While petitioner stresses that the plaintiff lost on his individual Title VII claim, he won on his claim under Sec. 1981 and, more importantly, he won a significant

---

* Contrary to petitioner's assertions (Petition, pp. 3, 21, 27), the Court of Appeals did *not* require that to establish compliance petitioner must meet any racial quotas, achieve recial balance in job categories, or give preferential treatment to racial minorities.

victory for the class of other black employees, present and future, of the petitioner. In the almost identical circumstances of *Parham* v. *Southwestern Bell Telephone Co., supra,* the individual plaintiff failed with respect to his personal claim, but succeeded in persuading the appellate court to order a remand of the cause to the district court to retain jurisdiction in order to ensure continued progress toward equal employment. The court stated, at 429-30:

> "Although we find no injunction warranted here, we believe Parham's lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally prior to February, 1967, Parham is entitled to reasonable attorney's fees . . . ."

See also *Lea* v. *Cone Mills Corp.,* 438 F.2d 86 (4th Cir. 1971); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 804 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1972).

In the case of Title II (the public accommodations provisions) of the same Civil Rights Act of 1964, identical language as to counsel fees* was applied by this Court to hold that it was an abuse of discretion to refuse to grant such fees to the victorious plaintiff:

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form

* Compare § 204(b), 42 U.S.C. § 2000a-3(b), with § 706(k), 42 U.S.C. § 2000e-6(k).

only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fee, a few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

"It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. Because no such circumstances are present here, the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402-403 (1968) (footnotes omitted).

And even in the absence of specific statutory provision for counsel fees, success on behalf of a class may itself be sufficient reason for such an award. *E.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1969).

CONCLUSION

As demonstrated above, the Court of Appeals in this case did no more than remand the case to the district court for entry of an order in conformity with the facts found by the district court and to retain jurisdiction of the case for entry of such future orders as might be necessary. This remand—consistent with the decisions of other circuits—is merely an example of the Court of Appeals based on the record as a whole exercising its supervisory administrative responsibilities over the district courts to ensure proper case management. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
WILLIAM L. ROBINSON
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ROBERT BELTON
CHAMBERS, STEIN, FERGUSON & LANNING
237 West Trade Street
Charlotte, North Carolina

CONRAD O. PEARSON
203½ E. Chapel Hill Street
P. O. Box 1428
Durham, North Carolina

Attorneys for Respondent.

Of Counsel

ALBERT J. ROSENTHAL
435 West 116 Street
New York, New York 10027